

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRANDON WHITEHEAD

Claimant

V.

TARGET STORE

Respondent

AND

TARGET CORPORATION

Insurance Carrier

CS-00-0050-730

AP-00-0451-529

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 4, 2020, motion Order entered by Administrative Law Judge (ALJ) David J. Bogdan. John J. Bryan of Topeka, Kansas, appeared for claimant. Stephen P. Doherty of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ granted respondent's Motion to Dismiss pursuant to K.S.A. 44-523(f) because no motion for extension was submitted, nor had the claim gone to regular hearing, settlement hearing, or agreed award within three years after the application for hearing was filed.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 2, 2020, Motion Hearing and the exhibits; the transcript of the June 2, 2020, Preliminary Hearing and the exhibits for Case No. CS-00-0002-625; and the transcript of the November 14, 2019, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the ALJ's Order should be reversed. Claimant requests this matter be remanded to the ALJ for an analysis and determination of whether good cause exists for this case to not have been concluded within three years of the application for hearing. Claimant contends the Kansas Supreme Court's interpretation of the statute is incorrect.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the claim must be dismissed because claimant failed to file a motion for an extension within three years of filing an application for hearing. Further, respondent argues the Board lacks jurisdiction to determine whether a statute is unconstitutional.

The issues for the Board's review are:

1. Did the ALJ properly dismiss this claim pursuant to K.S.A. 44-523(f)(1)?
2. Is K.S.A. 44-523(f)(1) constitutional?

FINDINGS OF FACT

Claimant worked for respondent in the warehouse unloading, sorting, and distributing boxes of product. Claimant suffered a compensable injury to his left shoulder on February 29, 2016, while pulling boxes of laundry detergent. Claimant underwent medical treatment, including surgery with Dr. Vosburgh on May 13, 2016, and returned to work without restrictions upon his release on October 8, 2016. Claimant filed an application for hearing with the Division of Workers Compensation on November 7, 2016. The claim was assigned case number CS-00-0050-730.

Claimant again injured his left shoulder on May 16, 2017. An application for hearing was filed on May 26, 2017, and this new claim was assigned case number CS-00-0002-625. Claimant underwent surgeries on his left shoulder with authorized provider Dr. Satterlee on September 1, 2017, and December 14, 2018. He was released with permanent restrictions on April 29, 2019.

Claimant filed a Motion to Extend K.S.A. 44-523(f) Time Limit for both cases on March 3, 2020. Respondent filed its Motion to Dismiss on March 4, 2020. Following a motion hearing held June 2, 2020, the ALJ granted an extension of time for CS-00-0002-625 because claimant had shown good cause and had timely filed his Motion to Extend. The ALJ dismissed claim CS-00-0050-730 pursuant to K.S.A. 44-523(f)(1).

Claimant timely appealed.

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-523(f)(1) states:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with

notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three-year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

ANALYSIS

1. Did the ALJ properly dismiss this claim pursuant to K.S.A. 44-523(f)(1)?

Under the current interpretation of K.S.A. 44-523(f), a claimant must proceed to regular hearing, a settlement, or an agreed award within three years from the date the application for hearing is filed. In the alternative, claimant must file a motion to extend the deadline prior to the expiration of the three-year time limitation.

In *Glaze v. J.K. Williams, LLC*, the Supreme Court wrote, regarding K.S.A. 44-523(f)(1), the statute:

. . . unambiguously prohibits an ALJ from granting an extension unless a motion for extension has been filed within three years of filing the application for hearing. Any other interpretation strains the common reading of the statute's ordinary language. This conclusion is confirmed when general rules of grammar and punctuation are applied.¹

In *Hackler v. Peninsula Gaming Partners*,² *Hoffman v. Dental Central, P.A.*,³ and *Ramstad v. U.S.D. 229*,⁴ the Board stated a claimant's motion to extend the three-year period upon a showing of good cause must be made before the three-year period expires. Because such motions were either not timely filed or not filed at all, the Board affirmed dismissals of those claims.

¹ *Glaze v. J.K. Williams, LLC*, 309 Kan. 562, 565-66, 439 P.3d 920, 923 (2019).

² *Hackler v. Peninsula Gaming Partners, LLC*, No. 1,060,759, 2016 WL 858312 (Kan. WCAB Feb. 25, 2016).

³ *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015).

⁴ *Ramstad v. U.S.D. 229*, No. 1,059,881, 2015 WL 5462026 (Kan. WCAB Aug. 31, 2015).

In *Hoffman*, the Board concluded K.S.A. 44-523(f) is “very specific in its requirement that the motion to extend be filed prior to the running of the three-year limitation[,]” “[t]here is nothing ambiguous about this statute,” and attempts to label the statute vague appeared to be an attempt to avoid the legislative mandate in the statute.⁵

Even actively prosecuted claims have been dismissed, as occurred in *Garmany v. Casey's General Stores*,⁶ wherein the Court wrote:

Donna L. Garmany's workers compensation claim was dismissed by the Kansas Workers Compensation Board (Board) pursuant to K.S.A. 2011 Supp. 44-523(f)(1), because her claim had not proceeded to hearing within 3 years of filing and she had not requested an extension within that 3-year period. It was dismissed in spite of the fact that she had not been dilatory in pursuing her claim, she had not abandoned her claim, and there was no dispute that she had not reached maximum medical improvement. Unfortunately, the statute that requires this result, although inartfully drafted, is not ambiguous so we are required to uphold the Board's decision. It is up to the legislature to change the statute if it wants to avoid this clearly harsh result in the future. Accordingly, we affirm the decision of the Board dismissing Garmany's claim.⁷

Under K.S.A. 44-523(f), a motion to extend for good cause must be filed before the applicable time frame runs.⁸ No such motion was filed in this claim. Unfortunately, the Board is limited to dismissing the February 29, 2016, claim, Case No. CS-00-0050-730, as required by the strict language of K.S.A. 44-523(f). As noted twice in *Garmany*, this is a “clearly harsh” result that is left to the Legislature to address.⁹

The application for hearing was filed by claimant on November 7, 2016. Pursuant to K.S.A. 44-523(f)(a), claimant was required to file a motion to extend benefits by November 7, 2019. No motion to extend the three-year time period was filed by claimant within the three years. The Board finds claimant failed to file a motion to extend within three years of filing an application for hearing as required by K.S.A. 44-523(f)(1). As such, his claim must be dismissed.

2. Is K.S.A. 44-523(f)(1) constitutional?

⁵ *Hoffman*, *supra*, at 5.

⁶ *Garmany v. Casey's General Stores*, No. 116,445, 2017 WL 754305 (Kansas Court of Appeals unpublished opinion filed Feb. 24, 2017) *rev. denied* 306 Kan. ____ (2017).

⁷ *Id.*

⁸ See *id.*

⁹ *Id.*; *Knoll v. Olathe Sch. Dist.* No. 233, 309 Kan. 578, 583, 439 P.3d 313 (2019).

The Appeals Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.¹⁰ The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. The Board does not have jurisdiction and authority to determine a statute is unconstitutional.¹¹

CONCLUSION

Claimant failed to comply with the requirements set forth in K.S.A. 44-523(f)(1). Case No. CS-00-0050-730 involving a February 29, 2016, injury is dismissed. The Board lacks jurisdiction to rule on a constitutional challenge.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge David J. Bogdan dated June 4, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier

¹⁰See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the AMA Guides, 6th Edition, for a scheduled injury was unconstitutional as applied in that case only).

¹¹ *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

Hon. David J. Bogdan, Administrative Law Judge